Filed 6/2/04 P. v. Vaughn CA2/7

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>EMANUEL VAUGHN,<br><br>Defendant and Appellant. | B166574<br><br>(Los Angeles County<br>Super. Ct. No. TA062441) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Steven Suzukawa, Judge. Affirmed.

Andrew E. Rubin for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jaime L. Fuster and Zee Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

Emmanuel Vaughn appeals from the judgment entered following his second degree murder conviction, enhanced with firearm use findings. He contends the trial court erroneously admitted gang expert testimony and evidence of third-party threats. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

An information charged Emmanuel Vaughn (appellant) with first degree murder and alleged three firearm use enhancements. (Pen. Code, §§ 187, subd. (a); 12022.53, subds. (b), (c) & (d).) The information further alleged that appellant had suffered a prior serious or violent felony within the meaning of the "Three Strikes" law. (Pen. Code, §§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d).)

1. *Prosecution Evidence*

The prosecution's theory of the case was that the murder was gang-related.

Gary Miller testified that he worked at a market owned by Amina Rob near the corner of San Pedro and East 119th Streets in Los Angeles. He had lived in the surrounding neighborhood for over six years. Miller had seen appellant in Rob's market on occasion and with members of the local gang, the 118th Street East Coast Crips (East Coast Crips).

Amina Rob testified that appellant had frequented her market. On February 11, 2001, Rob heard several gunshots before 8:00 a.m. while opening the market. She walked outside and saw appellant shooting at a car driven by Javier Reyes, who later died from gunshot wounds. Appellant ran from the empty lot next to the market, across 119th Street, and towards Main Street. Rob was frightened. After initially denying it, she later admitted witnessing the shooting to police, but she was afraid to cooperate. Rob subsequently gave police some store surveillance tapes showing appellant previously inside her store. She also identified appellant as the shooter from a six-pack police photographic display. On April 1, 2001, Rob heard gunshots outside the market and

discovered bullet holes in her car. She was scared and believed her car had been shot up because she had witnessed a murder.

Detective William Smith testified as the investigating officer. From Rob's statements and the physical evidence, he concluded that appellant fled from the scene of the shooting to his residence on East 120th Street, which also served as a "hangout" for East Coast Crip members. Pursuant to a search warrant, police searched appellant's residence. Among the items the officers found was a letter from a person in custody, addressed to "Baby D.".

Officer Mark Arenas testified as the prosecution's gang expert. He explained the relationship between East Coast Crips and South Side 18 as rival gangs, and identified Reyes as a South Side 18 gang member who lived a block away from the East Coast Crips' hangout on East 120th Street. Arenas concluded that appellant was an East Coast Crips gang member. In response to a hypothetical, the detective opined that the shooting of a South Side 18 gang member in East Coast Crips territory by an East Coast Crips gang member is a gang-related shooting. He also testified that when Rob's car was shot up, the East Coast Crips were sending her a message not to testify.

2. *Defense Evidence*

Appellant presented an alibi defense. He did not testify.

Elizabeth Vaughn, appellant's mother, testified that she and family members attended church services on the morning of the shooting. Appellant joined them at around 8:45 a.m. They all remained at church until 2:00 p.m. On cross-examination, Vaughn admitted that in 2000, she had attempted to cash a fraudulent check for $15,000 at a bank.

The jury convicted appellant of second degree murder with true findings for the firearm use enhancements. The prosecution did not present evidence on the prior strike allegation and it was dismissed. The trial court sentenced appellant to an aggregate state prison term of 40 years to life. He filed a timely notice of appeal.

## DISCUSSION

1. *Gang-Related Testimony*

a. *Relevant Proceedings*

Before trial, the defense objected to the prosecution's proposed evidence of appellant's gang affiliation to show appellant's motive in shooting Reyes. The court agreed that if the prosecution sufficiently established appellant's gang membership at a foundational hearing, such limited evidence would be admissible at trial to prove motive. (Evid. Code, § 402.)

At the ensuing hearing, Officer Arenas explained in detail his training and experience in investigating local gangs, particularly the East Coast Crips. He described the boundaries of the gang's claimed territory as encompassing Rob's market. Arenas opined that appellant was an East Coast Crip. He based his opinion on his personal knowledge and observations, his conversations with other officers, and his review of evidence retrieved from the East 120th Street residence pursuant to a search warrant. Specifically, other officers told Arenas that appellant had self-identified as an East Coast Crip, that he had associated with other gang members, that his gang moniker was "Infant Dog" or "Infant Hot Dog," and that his home was the East 120th Street residence where Arenas had seen gang members congregate. Arenas also examined a letter addressed to "Baby D.," which police had found in searching appellant's residence. The officer also understood that trial witnesses would identify appellant as a gang member.

At the conclusion of the hearing, the trial court determined that Arenas qualified as a gang expert and could testify as to appellant's gang membership. However, the court ruled that only evidence of appellant's motive as prompted by gang rivalry was admissible. The prosecution was therefore restricted to introducing evidence that: (1) appellant was an East Coast Crip; (2) Reyes belonged to a rival gang; (3) the killing occurred in East Coast Crip territory; and (4) Reyes was driving by in his vehicle when

he was shot. The court overruled an Evidence Code section 352 relevance objection by the defense and found Arenas's limited testimony was more probative than prejudicial.

At trial, Arenas's opined that appellant was an East Coast Crip for the reasons he stated at the foundational hearing. He also explained how the letter recovered from appellant's residence influenced his opinion. The "Baby D." address on the letter is a common abbreviated reference among gangs to appellant's (Infant Dog) moniker. The body of the letter contained East Coast Crip symbols and word play that would only appear in a document intended for a fellow gang member.

b. *Admissibility*

Appellant renews his attacks on Arenas's expert testimony of appellant's gang membership. His arguments center around purported foundational weaknesses in the testimony and complaints the evidence should have been excluded under Evidence Code section 352. We find no infirmity in its admission.

If there exists a reasonable or even fairly debatable justification for a trial court's exercise of discretion, it will not be set aside on appeal. (*People v. Crandell* (1988) 46 Cal.3d 833, 863; criticized on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364.) The admission of gang evidence over an Evidence Code section 352 objection (relevance of evidence outweighed by its prejudice) will not be disturbed on appeal unless the trial court's decision "exceeds the bounds of reason." (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369; *People v. Stewart* (1985) 171 Cal.App.3d 59, 65 ["It has been said that the term judicial discretion implies the absence of arbitrary determination, capricious disposition, or whimsical thinking"].)

The concern in admitting such evidence of a criminal defendant's gang membership is that it may create a risk that the jury will improperly infer guilt from the notion that defendant as a gang member has a criminal disposition. (*People v. Cardenas* (1982) 31 Cal.3d 897, 904-905; Evid. Code, § 1101.) Also, such evidence may, in effect, constitute impermissible opinions on guilt or innocence. (See *People v. Torres* (1995) 33 Cal.App.4th 37, 46-47.) Nevertheless, in California, so-called gang expert testimony can

be admissible. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617.) The evidence may be admitted if it is relevant to issues of identity, intent or motive, unless its probative value is outweighed by its prejudicial effect. (*People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Champion* (1995) 9 Cal.4th 879, 922; *People v. Sandoval* (1992) 4 Cal.4th 155, 175.)

Appellant mischaracterizes the subject of Arenas's testimony as whether appellant "did admit to being a gang member" and then argues it was not a proper topic of expert opinion. This contention fails for the obvious reason that the officer's testimony concerned whether appellant was affiliated with a gang, not whether he had admitted such affiliation.[1] Under Evidence Code section 801, a requirement for expert testimony is that it relate to a subject sufficiently beyond common experience as to assist the trier of fact. (Evid. Code, § 801, subd. (a); see *People v. Olguin, supra,* 31 Cal.App.4th 1355, 1371; *People v. Valdez* (1997) 58 Cal.App.4th 494, 506.) Gang membership meets this criterion and is thus the proper subject of expert opinion. (See *People v. Williams, supra,* 16 Cal.4th 153, 193; *People v. Champion, supra,* 9 Cal.4th 879, 922; *People v. Sandoval, supra,* 4 Cal.4th 155, 175.)

In the instant case, the reason for the Reyes killing was a matter sufficiently beyond common experience to require interpretation by someone with in-depth knowledge of the local street gangs, thus bringing the matter within Evidence Code section 801. Without Arenas's testimony, the jury would not have known that appellant and Reyes were members of rival gangs, that the East Coast Crips controlled the territory

---

[1] We also reject appellant's suggestion that expert testimony about gang membership is admissible only when a gang-enhancement (see Penal Code section 186.22 [enhancement for crimes committed for benefit of criminal street gang]) is alleged. On the contrary, such evidence has been admitted in numerous cases to prove motive and identity, where as here, there is no gang enhancement. (*People v. Williams, supra,*16 Cal.4th 153, 193; *People v. Champion, supra,* 9 Cal.4th 879, 922; *People v. Sandoval, supra,* 4 Cal.4th 155, 175.)

where Reyes was killed, or that rivalry would provide a motive for appellant shooting and killing Reyes on East Coast Crips' turf. Indeed, appellant does not contest the relevance of this evidence as probative of motive and identity, only the manner in which it was admitted into evidence.

In a related argument, appellant contends that Arenas's testimony did not constitute an expert opinion, but was merely a recitation of otherwise unreliable hearsay. The hearsay was purportedly unreliable because it consisted of unattributed statements that were not properly substantiated by either other witnesses or Arenas's personal knowledge of appellant's gang affiliation.

Here, too, the record fails to support appellant's claims. Another requirement for expert testimony is that it be based on matter that is reasonably relied upon by an expert in forming an opinion upon the subject to which his or her testimony relates. (Evid. Code, § 801, subd. (b); see *People v. Gardeley, supra,*14 Cal.4th 605, 618.) Any material that forms the basis of an expert's opinion testimony must be reliable. So long as this threshold requirement of reliability is met, even material that is ordinarily inadmissible, such as out-of-court declarations by other persons, can form the proper basis for an expert's opinion testimony. (*People v. Gardeley, supra,* 14 Cal.4th 605, 618.) This may include "'personal observations of and discussions with gang members as well as information from other officers and the departments files.'" (*People v. Olguin, supra*, 31 Cal.App.4th 1355, 1371.)

Appellant's position to the contrary, Arenas's expert testimony was not derived from unreliable hearsay. Although the officer did not interview appellant, his opinion as to appellant's gang membership was properly based, in part, on information received from other named officers. (*People v. Gardeley*, *supra,* 14 Cal.4th 605, 620; *People v. Gamez* (1991) 235 Cal.App.3d 957, 966 overruled on another ground in *People v. Gardeley, supra,* at p. 624, fn. 1.) At the foundational hearing, Arenas explained that he was told by Officer Chavez that appellant belonged to the East Coast Crips and that appellant's residence was a known gang hangout. Officer Smith's trial testimony

substantiated the hearsay statement attributed to Chavez that the residence was a gang hangout and appellant's home. Arenas further testified that he was personally familiar with the residence as a gang hangout. Thus, the hearsay upon which Arenas formulated his opinion was reliable.

Appellant's claim is meritless that Arenas did not render an opinion, but merely repeated the hearsay statements of others. Although the officer's testimony included (reliable) hearsay evidence, appellant overlooks the fact it also was based on an interpretation of gang-related trial evidence. Without a defense objection, Arenas opined that the address and contents of the recovered "Baby D." letter indicated it was intended for appellant as a member of the East Coast Crips.

Finally, we find no abuse of discretion here. The gang evidence presented was of more than minimal probative value. In support of the prosecution's theory of the case, it tended to establish that appellant and the victim were members of gangs sharing a deadly rivalry. (Cf. *People v. Sandoval, supra,* 4 Cal.4th 155, 175.) The trial court reasonably concluded that the probative value of appellant's gang membership and the relationship between the two gangs was not outweighed by its prejudicial effect.[2]

---

[2] Appellant's reliance on *In re Wing Y.* (1977) 67 Cal.App.3d 69 is misplaced. In that case, the Court of Appeal held the trial court committed prejudicial error by admitting a police officer's irrelevant and hearsay testimony of the defendant's gang membership. The court noted the officer was not testifying as an expert witness and the testimony was not relevant to prove a disputed fact, i.e., the identity of the perpetrator. "Membership in an organization does not lead reasonably to any inference as to the conduct of a member on a given occasion." (*Id.* at p. 79.) The instant case is readily distinguished because the gang evidence was presented by an expert witness and was relevant to prove motive.

2. *Third-Party Threats*

a. *Relevant Proceedings*

Over defense objections, the trial court admitted prosecution evidence of third-party threats against Rob and her employee, Miller. Following earlier motions in limine, the trial court determined the evidence was relevant to the witnesses' credibility or their willingness to testify and was therefore admissible. Each witness's trial testimony was followed up by the court's limiting instruction.

Rob testified that after talking to police her car was shot up, which she feared was because she had witnessed Reyes's murder. The court advised the jury that the April 1, 2001 shooting of Rob's car was to be considered "only as to what effect you think it has on this witness'[s] -- has on her credibility and at . . . towards giving testimony and speaking to the police."

Miller testified that a woman entered the market shortly before trial, and asked whether he or Rob were going to testify. Miller said he was not afraid to testify because he did not know anything about the case. When questioned whether he would tell the jury if he did know something, he testified that he did not "get involved with things like that at all." When asked what would happen if he became involved, Miller indicated he would "automatically" be labeled as a snitch, but he "couldn't tell" if the East Coast Crips would retaliate against him. The court instructed the jury: "I give you the same instruction that I gave you concerning the car on April 1st: You may use this testimony and consider it in what weight you give the witness'[s] testimony and as to any reason why he may be testifying in the manner in which he is."

b. *Admissibility*

Appellant contends the trial court erred by admitting the evidence of third-party threats. Not so. Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is thus admissible. (*People v. Burgener* (2003) 29 Cal.4th 833, 869.) "An explanation of the basis for the witness's fear is likewise relevant to her credibility and is well within the discretion of the trial court."

(*Ibid.*) In this case, the threats explained Rob's reluctance to cooperate with police and Miller's equivocal trial testimony.

Appellant specifically complains that the prosecution failed to show the threats were associated with him as a prerequisite to their admissibility. However, "it is not necessary to show the witness's fear of retaliation is 'directly linked' to the defendant for the threat to be admissible. [Citation.] It is not necessarily the source of the threat – but its existence – that is relevant to the witness's credibility." (*People v. Burgener, supra,* 29 Cal.4th at p. 869.)[3]

Moreover, inasmuch as the court promptly instructed the jury as to the limited purpose of the evidence, the trial court did not abuse its discretion under Evidence Code section 352, in allowing the testimony. Appellant points to the limiting instruction as improperly allowing the jury to consider the testimony of third-party threats for issues other than each witness's credibility.[4] However, appellant failed to object to the instruction as given. As a general rule, failure to object to an instruction given waives any objection thereto. (*People v. Rivera* (1984) 162 Cal.App.3d 141, 146.) An exception to the rule of waiver arises, however, if the instruction affected the substantial rights of defendant. (Pen. Code, § 1259; *Rivera, supra*, at p. 146.) A defendant's substantial rights are affected if the instruction results in a miscarriage of justice, making it

---

[3] Invoking *People v. Weiss* (1958) 50 Cal.2d 535, appellant correctly notes that the admission of evidence purporting to show the suppression or attempted suppression of evidence is erroneous absent the prerequisite proof that the defendant was present at such an incident or proof of authorization of such illegal conduct. (*Id.* at p. 554.) However, unlike *Weiss*, the prosecution here introduced the statements of Rob and Miller to buttress their credibility, not to prove appellant's consciousness of guilt. (*Ibid.*)

[4] Appellant argues that while the admonition concerning Rob's testimony was proper, the admonition concerning Miller's testimony wrongly permitted the jury to use his testimony for any purpose. Additionally, appellant maintains that because the court indicated the two admonitions were the same, the jury was made to understand the testimony of both witnesses could be used for any purpose.

reasonably probable that absent the erroneous instruction defendant would have obtained a more favorable result. (*Rivera, supra*, at p. 146; see Cal. Const., art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Assuming for the sake of argument the limiting instruction was improper, given the strength of Rob's identification testimony, and the fact that identity was the sole contested issue at trial, we are convinced that the improper limiting instruction did not contribute to the jury's verdict. Stated otherwise, it is not reasonably probable that the jury would have acquitted appellant if the challenged instruction had been properly limited. Consequently, appellant has waived his claim of instructional error. (*People v. Rivera, supra,* 162 Cal.App.3d at p. 146.)

**DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WOODS. J.

We concur:

JOHNSON, Acting P. J.

ZELON, J.